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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. [redacted] 1249

BOARD OF TRANSPORTATION OF NEW CASTLE COUNTY, DELAWARE, *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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CIVIL AERONAUTICS BOARD, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Board of Transportation of New Castle County, Delaware, successor to the powers and responsibilities of the New Castle County Airport Commission, petitioner below, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in *New Castle County Airport Commission* v. *Civil Aeronautics Board* on November 17, 1966, as to which the said Court of Appeals denied petitioner's petition for rehearing *en banc* on January 9, 1967.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit of which review is sought is reported at 371 F.2d 733. A true copy appears in Appendix A to this brief. The judgment of the Court of Appeals and the denial of petition for rehearing *en banc* also appear in Appendix A.

JURISDICTION

The judgment of the court below affirming the orders of the Civil Aeronautics Board ("Board") brought before it by Petition for Review was entered on November 17, 1966. R. 617. Rehearing was denied on January 9, 1967. R. 644. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Did the reviewing court of appeals have the discretion to refuse to set aside Board orders eliminating Delaware's east-west air transportation, after the Court found that the Board did *not* make the statutorily-*required* ultimate finding that the public convenience and necessity affirmatively requires such elimination, and after the Court held that this error was not, as the Government claimed, "inconsequential", in view of Section 10(e) of the Administrative Procedure Act which imposes a mandatory duty on a court reviewing administrative orders to "hold unlawful and set aside agency action found to be . . . not in accordance with law . . ." or in excess of "statutory authority" or "short of statutory right", and the decisions of this court in *City of Yonkers* v. *United States*, 320 U.S. 685 (1944); *United States* v. *Baltimore*

& Ohio R. Co., 293 U.S. 454 (1935); and *Mahler* v. *Eby*, 264 U.S. 32 (1924)?

2. Did the reviewing court err in approving the Board's decision made without reference to the Board's own, or indeed, any decisional standards, working rules, or criteria, other than the statutory phrase "public convenience and necessity"?

3. Did the court err in failing to decide relevant questions of law presented by petitioner when Section 10(e) of the Administrative Procedure Act imposes a mandatory duty on courts reviewing agency action to "decide all relevant questions of law"?

STATUTES AND REGULATIONS INVOLVED

The pertinent constitutional and statutory provisions and Board regulations are set forth in Appendix B to this brief.

STATEMENT

This case arose under the Board's policy of instituting investigations to determine if certificated air service should be eliminated—its so-called "use it or lose it" policy for subsidized local service air carriers. 14 C.F.R. 399.11.

Wilmington, Delaware, had been certificated for east-west air service since 1947. The Board found, and reaffirmed, that the public convenience and necessity required this service by multiple air carriers. *Cincinnati-New York Additional Service,* 8 C.A.B. 152, 163-64 (1947); *Middle Atlantic Area Case,* 9 C.A.B. 131, 146-47, 171, 172 (1948); *All American Renewal Case,* 17 C.A.B. 400 (1953); *Renewal of Allegheny Airlines Temporary Intermediate Points,* 33 C.A.B. 117 (1961).

The last-cited proceeding in 1961 involved a related question to that determined by the Board in the instant proceeding, to wit: whether Allegheny Airlines' authority to serve Wilmington on the east-west segment 3 of its certificate of public convenience and necessity for Route No. 97 should be renewed, and if renewed, whether the authority should be temporary or permanent. The Board found, pursuant to Section 401(d) of the Federal Aviation Act of 1958, as amended,[1] that this transportation service is *required* by the public convenience and necessity in light of the record having established that Wilmington could generate at least five daily passenger enplanements, this being the Board's principal decisional criterion for determining the need for subsidized air service by local service carriers. The Board renewed Allegheny's authority for the second time. (Authority for a temporary period was originally granted in 1948 in the *Middle Atlantic Area Case, supra,* and renewed for a further temporary period in 1953 in *All American Renewal Case, supra.*) The Board decided to renew this authority on a *permanent* basis.

The instant proceeding was initiated in 1963 and the hearing examiner concluded that the record showed that Wilmington could satisfy the five-a-day traffic standard of the "use it or lose it" policy, that the subsidy cost, if any, was minimal, and that the public need for this service was unabated, albeit Allegheny had not provided service necessary to meet the minimum needs of the market, *i.e.,* two daily round trips timed to provide commuter service in both directions. R. 509-16.

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[1] 72 Stat. 754, 49 U.S.C. 1371(d). The Federal Aviation Act of 1958, as amended, is referred to hereinafter as the "Act."

The Board, with only three of its five members participating, held that the examiner's approach was "unduly narrow": The Examiner had *erred* because he had based his decision on the specific criteria of the Board's "use it or lose it" policy! The Board said that the Examiner should have determined whether the service was "required", using the statutory phrase "public convenience and necessity" as the sole decisional criterion. R. 546-47. The Board thereupon concluded that the service was not required by the public convenience and necessity and ordered deletion of Wilmington from Allegheny's certificate describing service to the west.[2] R. 550-51. The Board did not find, as required by section 401(g) of the Act, that *elimination* of this historic certificated service was *required.*

Petitioner requested reconsideration. The Board conceded numerous errors and in a complete new opinion *assumed* that the standards of the "use it or lose it" policy were satisfied. It held again that the *service* was not required. R. 572-87. It did not find that *elimination* of the service was required.

The Board's action on reconsideration was taken *after* one of the three qualified and participating members, former Chairman Boyd, had left the Board. Mr. Boyd indicated his vote *in camera* (as did the other two participating members). Mr. Boyd left the Board prior to the Board meeting to discuss and decide the case: the meeting was held eight days *after* Mr. Boyd left. With only two of its five members qualified, the Board purported to "ratify" the decision promulgated on the *in camera* "notation" of

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[2] North-South service provided by Allegheny was not in issue.

the votes of three members. The Board's written procedures require a meeting to act on and ratify such "notation" votes. (See Appendix B.)

In two contemporaneous decisions, the Board granted petitions to rehear cases decided where the Board was left without a quorum of qualified members. In addition, in one of these cases, the Board granted rehearing because of acquisition of new aircraft affecting the economics and traffic potential of the service in issue. Although Wilmington's case involved a change in Board membership and acquisition by Allegheny of new aircraft types drastically affecting the economics and traffic potential of the route, the Board *without explanation* denied Wilmington's petitions for equal treatment.

Petitioner sought review by the Court of Appeals for the District of Columbia Circuit pursuant to Section 1006(a) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. 1486, 72 Stat. 795, and Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009, 60 Stat. 243.

The court affirmed the Board. The court found, however, that the Board had not conformed to the statutory test for *eliminating* certificated service: "The Board's ultimate finding was that the public convenience and necessity did not require continuance of the service whereas the statutory test is satisfied only if the Board finds that the public convenience and necessity affirmatively requires deletion." The court was "not prepared to treat the difference as inconsequential, as the Government urges." 371 F.2d at 735.

The court did not rule on relevant questions of law presented and necessary to the issue of whether the

Board's orders should be set aside. The court, also, in petitioner's view, erroneously deciding the other questions it did reach. Petitioner sought rehearing by the Court of Appeals *en banc* which was denied by order without opinion.

ARGUMENT

This case presents neat and clear examples of the malaise of the administrative process which have been the subject of scholarly discussion,[3] congressional investigation,[4] and declarations of concern by the Supreme Court:

> "Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise,* the strength of modern government, can become a monster which rules with no practical limits on its discretion.'"[5]

This case involves a Board decision eliminating certificated air service without the statutory finding that such elimination is required by the public convenience and necessity. The reviewing court of appeals identified this as error, held it was substantial error, but permitted the error to stand in the "interest of justice". (See Point I, *infra.*)

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[3] See, *e.g.*, Judge Friendly's Holmes Lectures published under the title *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 Harv.L.Rev. 863 (1962); REDFORD, NATIONAL REGULATORY COMMISSIONS: NEED FOR A NEW LOOK, Bureau of Governmental Research, University of Maryland (1959).

[4] See, *e.g.*, House Report No. 2711, 85th Cong. 2d Sess. (1959).

[5] *Burlington Truck Lines* v. *U. S.*, 371 U.S. 156, 167 (1962).

This case involves a Board decision which not only does not conform to the statutory standard, but does not conform to the Board's own criteria and working rules applied in similar cases, or indeed, to any criteria or working rules. The reviewing court of appeals permitted this to stand. (See Point II, *infra.*)

Finally, this case involves serious questions of "voting" by the Board without meeting, in contravention of the Board's own procedures and the Act, of unexplained inconsistent action, and of Board failure to consider statutorily-listed decisional factors. The reviewing court did not even discuss these errors. (See Point III, *infra.*)

This case thus presents the important problem of delimiting judicial control of administrative action which the Supreme Court has accepted as its singular responsibility. *N.L.R.B.* v. *Walton Manufacturing Company,* 369 U.S. 404 (1962); *Universal Camera Corp.* v. *N.L.R.B.,* 340 U.S. 474 (1951).

This relatively simple factual case, involving air service to only one point, focuses important problems of administrative decision-making and judicial responsibility. The courts of appeal are at sea, and are adopting widely different attitudes toward these questions. The time is ripe for the Supreme Court to announce guiding principles, and this case is a perfect opportunity to do so.

I. Failure To Make Statutory Findings Is "a Matter of Great Substance."

The delegation of legislative and judicial power to administrative agencies was approved by this court subject to the requirement that Congress must set the standards for administrative action. *Panama Refining*

Co. v. *Ryan*, 293 U.S. 388 (1935); *Schechter Corp.* v. *United States*, 295 U.S. 495 (1935).

In the Federal Aviation Act, Congress provided for certification of new service, or recertification of temporarily-authorized service, by the test of whether the service is required by the public convenience and necessity. Section 401(d) of the Act.

Congress imposed a different and more exacting test for elimination of certificated air service: the Board must affirmatively find that the public convenience and necessity *require elimination* of the air service. Section 401(g) of the Act.[6]

The court below held that the Board did not make the statutorily-required finding before certificated air service could be eliminated by Board order, and that this omission was a matter of substance. 371 F.2d at 735. The court below held that it had the discretion to refuse to vacate the Board's order. 371 F.2d at 735-36.

The Administrative Procedure Act contains Congress' mandatory declaration that reviewing courts

> ". . . shall . . . hold unlawful and set aside agency action . . . not in accordance with law; . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; . . ." Section 10(e), Administrative Procedure Act, 5 U.S.C. 1009(e), 60 Stat. 243.

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[6] *Cf.*, *Hall* v. *F.C.C.*, 237 F.2d 567 (C.A.D.C., 1956), involving merely diminution of broadcasting service:

> "That such a curtailment of service is not in the public interest is axiomatic." 237 F.2d at 572.

See also *Civil Aeronautics Board* v. *Delta Air Lines, Inc.*, 367 U.S. 316 (1961).

The court below thus erred by violating a clear congressional direction to set aside agency action not in accordance with law and the agency's jurisdiction. This Court should grant certiorari to declare, for the benefit of all courts reviewing administrative agency action, the necessity of strict obedience to congressional standards.

Even before the Congress spoke in the Administrative Procedure Act, this Court had announced that agency obedience to statutory standards was required on constitutional grounds. It was considered "a matter of great substance":

> "This is not to insist on formalities and to burden the administrative process with ritualistic requirements. It entails a matter of great substance. It requires the Commission to heed the mandates of the Act and to make the expert determinations which are conditions precedent to its authority to act." *City of Yonkers* v. *United States,* 320 U.S. 685, 692 (1944).[7]

The Board here did not make the "expert determination" that elimination of Wilmington's service was required by the public convenience and necessity. This determination is a "condition precedent to its authority to act." The court below, having held that

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[7] The court below's view is essentially the same as that taken by the three-judge court in *Public Service Commission of State of N.Y.* v. *U. S.*, 50 F.Supp. 497 (S.D.N.Y., 1943), in the appeal from an ICC decision in which it was alleged, as in the instant case, that the ICC had not made the finding, required by statute. The lower court affirmed the ICC, noting that the ICC had written "a careful opinion" and that the "evidence before the Commission was adequate." 50 F.Supp. at 499. This view, justified in dissent by Mr. Justice Frankfurter as avoiding an "insistence on such an empty formalism", was rejected by the Supreme Court in *City of Yonkers* v. *United States,* quoted above.

this determination was not made, should not have assumed that the Board will make the necessary finding upon remand. This is for the Board to do; not for a court to assume will be done.

Moreover, this error goes to the jurisdiction of the Board. The Board may not amend a certificate of public convenience and necessity except if it finds, affirmatively, that "the public convenience and necessity so require". Approving an action of the Board, where it has not made the required statutory finding, raises constitutional issues of unconfined delegation of legislative power.[8]

In *Mahler* v. *Eby*, 264 U.S. 32 (1924), Chief Justice Taft, writing for a unanimous court, reversed a district court which had sustained the issuance of warrants of deportation by the Secretary of Labor who had not made the "express finding", required by statute, that the petitioners were "undesirable residents". Not until their briefs to the Supreme Court did petitioners urge their claim that the warrants were, for this reason, defective and invalid. The Supreme Court held the "defect is jurisdictional", because

> "There is no authority given to the Secretary to deport except upon his finding after a hearing that the petitioners were undesirable residents." 264 U.S. at 43.

Another leading Supreme Court opinion, written by Mr. Justice Brandeis, in *United States* v. *Baltimore & Ohio R. Co.*, 293 U.S. 454 (1935), set aside an ICC order which had not made the statutory findings of "unnecessary peril to life or limb". These findings

[8] See *Kent* v. *Dulles*, 357 U.S. 116 (1958).

were held to be "quasi-jurisdictional findings essential to their constitutional or statutory validity." 293 U.S. at 465.

When a court identifies a legal error which is not "inconsequential", it must set the order aside. In *Jacob Siegel Co.* v. *F.T.C.*, 327 U.S. 608 (1946), the Supreme Court held that the Court of Appeals for the Third Circuit had erred in refusing to set aside an FTC decision after the Court of Appeals had found the remedy "too harsh".[9]

Review by this Court is required to reaffirm for the guidance of courts of appeals reviewing agency action the necessity of requiring adherence to critical, statutorily-required findings. It is not for a court to assume that the Board will find that the public convenience and necessity require elimination of this service, contrary to the Board's Examiner,[10] and contrary to the Board's own determinations four years earlier[11] and eight years before that[12] and five years before that[13] and one year before that.[14] The reviewing

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[9] This case is interesting because, on remand, under directions to consider less harsh alternatives, instead of justifying more fully its original conclusion, the Commission decided that another, less harsh, remedy would be appropriate. *Matter of Jacob Siegel Company*, 43 F.T.C. 256 (1946).

[10] R. 518.

[11] *Renewal of Allegheny Airlines Temporary Intermediate Points*, 33 C.A.B. 117 (1961): Segment 3 was renewed *permanently*.

[12] *All American Renewal Case*, 17 C.A.B. 400 (1953).

[13] *Middle Atlantic Area Case*, 9 C.A.B. 131, 146-47, 157, 172 (1948).

[14] *Cincinnati-New York Additional Service*, 8 C.A.B. 153, 163-64 (1947).

court's role and duty is to identify the error, and, on finding it is not "inconsequential", set aside the erroneous orders and remand the proceeding to the Board.

II. The Necessity of Definition and Adherence to Administrative Standards.

This case also presents, in an unusually neat and clear manner, the problems of an agency expressly departing from its own administrative standards and acting without reference to *any* decisional criteria, standards, or working rules. This problem has been focussed in the lectures of Judge Henry J. Friendly delivered at Harvard University, and printed in 75 Harv. L. Rev. 863 (1962) under the title, "Federal Administrative Agencies: The Need for Better Definition of Standards."

Definition of, and adherence to, definite decisional criteria, standards, or working rules has been held by this court necessary to the constitutional administration of an agency's powers. *Kent* v. *Dulles*, 357 U.S. 116 (1958).

Congress has set forth a policy requiring establishment of administrative decisional criteria and the giving of notice to affected parties. Sections 3(a) and 5(a), Administrative Procedure Act.[15]

The Courts of Appeal have grappled with this important area of judicial control of administrative action, and have taken widely divergent views.

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[15] 5 U.S.C. 1002(a), 60 Stat. 238; 5 U.S.C. 1004(a), 60 Stat. 239.

The Court of Appeals for the First Circuit has applied Judge Friendly's thesis, and held in *City of Lawrence, Mass.* v. *C.A.B.*, 343 F.2d 583 (C.A. 1, 1965):

> ". . . where Congress charges an agency with administering a statute in such broad terms as 'public convenience and necessity' it is imperative for the agency to narrow, clarify and explain this general directive 'to the point of affording a fair degree of predictability of decision in the great majority of cases, and of intelligibility in all.' Friendly, op. cit. p. 14. Standards are necessary, as Judge Friendly suggests, for reasons of fairness, to encourage the security of transactions, and to maintain the independence of the agencies; . . ." 343 F.2d at 587.

The Court of Appeals for the Fifth Circuit has uttered a similar demand for articulation of clear standards for decision. In *Hill* v. *F.P.C.*, 335 F.2d 355 (C.A. 5, 1964), the Court held,

> ". . . it is too late for an Agency to declare the standards to be met by its decision holding that they have not been met." 335 F.2d at 356.
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> * * *
>
> ". . . the Commission had the duty at some stage prior to the close of proof to declare what it considered the relevant standards to be." 335 F.2d at 358.

On the other hand, the Court of Appeals for the Seventh Circuit has held that "definitive criteria" are not necessary. In the recent *United Air Lines, Inc.* v. *C.A.B.*, 371 F.2d 221 (C.A. 7, 1967), the Court said,

> "It is evident from these broadly-phrased objectives that a 'public convenience and necessity' determination may be made without strict ad-

herence to rigid or definitive criteria . . ." 371 F.2d at 224.[16]

In the instant case, the Examiner had applied the Board's standards of the "use it or lose it" policy and held, as the Board had held in its prior cases reviewing the same service, that Wilmington could enplane five daily passengers, given a reasonable pattern of service, which Allegheny could provide at reasonable subsidy cost. The Board rejected the Examiner's "approach" and held that it could decide the case without *any* standards other than the ultimate statutory standards of "public convenience and necessity." R. 546.

The factors which the court below said the Board "balanced" (inconvenience, traffic and subsidy cost) are not factors applied in "use it or lose it" cases. They are the factors applied in "regional airport" cases. The Board did not deny this. It argued that it could, without notice or precedent, apply these factors because "the ultimate standard in either case is the public convenience and necessity."[17]

The Court, mistakenly, believed that petitioner was challenging the process of weighing and balancing.[18]

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[16] Only one year earlier, in *Outagamie County, Wis.* v. *C.A.B.*, 355 F.2d 900 (C.A.7, 1966), this same court reviewed a Board order in terms of the Board's application of the relevant criteria. The Court said,

> "We think the Board here did 'narrow, clarify and explain' the 'general directive' of public convenience and necessity in accordance with Judge Friendly's statement quoted in City of Lawrence, 343 F.2d at 587." 355 F.2d at 908.

[17] Board Brief to the Court of Appeals, p. 34, n. 40.

[18] "Petitioner contends that the balancing approach, though utilized by the Board in proceedings to certify a regional airport, is contrary to the Board's established approach in decertification proceedings involving the 'use it or lose it' policy." 371 F.2d at 734.

Petitioner was not. Petitioner was challenging the application of "regional airport" factors to a "use it or lose it" case. Indeed, as the Examiner found,[19] had the Board applied its own established standards for decision in a "use it or lose it" case, the service would not have been eliminated.

The critical difference between arguing and appraising the same evidence in light of different factors is demonstrated by the almost contemporaneous decision of the Board, in a "regional airport" case involving this same point, Wilmington, Del.: In *Eastern Air Lines, Redesignation of Philadelphia, Pa.-Wilmington, Del.*, Order E-22981, December 8, 1965,[20] the Board found that Wilmington should not lose north-south service by *two* air carriers, Allegheny and Eastern.

The very contradiction of these two, virtually contemporaneous decisions, should have alerted the court to require an especially clear application of the relevant decisional criteria.[21] How can "regional airport" factors point toward eliminating Wilmington's service in an east-west direction but retaining it in a north-south direction, when east-west traffic has historically been approximately equal to north-south traffic?

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[19] R. 509-10.

[20] Attached to Petitioner's Brief to the Court of Appeals as Appendix E.

[21] *Cf., Boston and Maine Railroad* v. *U. S.*, 202 F.Supp. 830, 837 (D.C.Mass., 1962), affirmed per curiam, 373 U.S. 372.

III. The Court Did Not Decide All Relevant Questions of Law.

The Administrative Procedure Act directs that a court reviewing agency action must "decide all relevant questions of law," Section 10(e), which is only a reaffirmation of basic judicial responsibility. The court below did not consider or decide the following independent questions of law, which were necessary to decision, were presented to the reviewing court, were not controlled by the issues decided by the Court, and if decided favorably to petitioner, would be dispositive:

1. The court did not decide the necessary and relevant question of whether the Board's Supplemental Opinion and Order was legally adopted. There never was a meeting, in quorum assembled, of the three (of the five) Board Members who participated in the final Supplemental Opinion and Order, as required by Section 201(c) of the Federal Aviation Act. There never was a ratification of this opinion and order at a Board meeting by a qualified majority, as required by the Board's own procedures when its members preliminarily note their "votes" without meeting.

The Board did not deny that ratification was required by its own written procedures, nor did the Board deny that ratification was never properly accomplished. The Board maintained that it need not follow its own procedures because of a case[22] upholding an ICC procedure for voting without a meeting in motor carrier application cases. The ICC procedure, however, did not provide for ratification of actions taken without a meeting, while the Board's procedures do.

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[22] *T.S.C. Motor Freight Lines* v. *U. S.*, 186 F.Supp. 777 (S.D. Tex., 1960), affirmed per curiam *sub nom. Herrin Transportation Co.* v. *U. S.*, 366 U.S. 419 (1961).

The court upholding the ICC's procedure recognized that the weight of authority was against its decision authorizing agency action without a meeting, but endorsed the ICC's procedure for disposing of motor carrier applications, out of urgent necessity "as an aid in dealing with [the ICC's] tremendous workload." (186 F. Supp. at 786). The Board made no contention of any similar necessity to deal with an annual load of 60 formal air route cases compared to the ICC's workload of 5,784 motor carrier cases.[23]

2. The court did not decide petitioner's contentions that the Board had acted arbitrarily and capriciously in denying petitions for rehearing of Wilmington's loss of its last east-west air service when the Board contemporaneously, granted rehearing to Braniff, after the second denial of its request for Miami-Dallas authority, on the ground that "only two of the three Board Members who participated in the original decision were still Members of the Board" (exactly the same situation applied to Wilmington), and when the Board, contemporaneously, granted rehearing to Terre Haute's objection to losing TWA's air service without a replacement by Lake Central on the ground of changed Board membership and acquisition of new equipment by the applicant carrier, Lake Central (both of which situations applied to Wilmington).

The Board had little to say in justification of its unequal actions, other than that its discretion is broad. Petitioner is entitled to a reviewing court's decision on its claim that the Board acted arbitrarily and

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[23] The figures for annual case load are taken from Hearings, Subcommittee of the Committee on Appropriations, "Independent Offices Appropriations for 1967", p. 188; Civil Aeronautics Board Report to Congress, Fiscal Year 1966, p. 75.

capriciously in the exercise of its discretion, however broad it may be.

3. The court below did not decide the question of whether the Board was legally obligated to consider and find that its action eliminating the last east-west air transportation to the entire State of Delaware resulted in the "development", "encouragement" and "promotion" of air transportation. Section 102, Federal Aviation Act; *American Airlines* v. *C.A.B.*, 192 F.2d 417, 420 (C.A.D.C., 1951).

4. The court below did not decide the question of whether the Board was obligated to give express recognition to its duty to "recognize and preserve" the "inherent advantages" of air transportation. Section 102(b), Federal Aviation Act; *Schaffer Transportation Company* v. *United States*, 355 U.S. 83 (1957); *Commercial Transport, Inc.* v. *United States*, 173 F. Supp. 524, 528 (E.D. Ill., 1959).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT M. BECKMAN
Counsel for Petitioner

April, 1967.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,693

NEW CASTLE COUNTY AIRPORT COMMISSION, PETITIONER,

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

ALLEGHENY AIRLINES, INC., INTERVENOR

Petition for Review of Orders of the
Civil Aeronautics Board

Decided November 17, 1966

Mr. Robert M. Beckman for petitioner.

Mr. Frederic D. Houghteling, Attorney, Civil Aeronautics Board, with whom *Assistant Attorney General Turner, Messrs. Joseph B. Goldman,* General Counsel, *O. D. Ozment,* Deputy General Counsel, *Warren L. Sharfman,* Associate General Counsel, Civil Aeronautics Board, and *Howard E. Shapiro,* Attorney, Department of Justice, were on the brief for respondent. *Mr. Lionel Kestenbaum,* Attorney, Department of Justice, and *John H. Wanner,* General Counsel, Civil Aeronautics Board at the time the record was filed, also entered appearances for respondent.

Mr. Edwin I. Colodny for intervenor. *Mr. David B. Armstrong* also entered an appearance for intervenor.

Before BAZELON, *Chief Judge,* WILBUR K. MILLER, *Senior Circuit Judge,* and LEVENTHAL, *Circuit Judge.*

LEVENTHAL, *Circuit Judge:* Petitioner seeks review of orders of the Civil Aeronautics Board which amended the certificate of public convenience and necessity of Allegheny Airlines, a federally subsidized local-service carrier serving Wilmington, Delaware, so as to delete Wilmington as a separate intermediate point on Allegheny's route segment 3, which runs from New York to Pittsburgh via Philadelphia and Wilmington. The Board acted under section 401(g) of the Federal Aviation Act,[1] which authorizes it to amend any carrier's certificate if the public convenience and necessity so require, and pursuant to the Board's "use it or lose it" policy,[2] whereby cities which do not make sufficient use of subsidized air service to justify its cost to the carrier and the government are subject to decertification proceedings under section 401(g). Petitioner, a governmental agency operating the Wilmington Airport, challenges the Board's action and the consequent loss of direct service between Wilmington and Pittsburgh. We find the Board's action free of reversible error.

The Board made its decision by weighing several factors: the inconvenience to Wilmington passengers in having to use the extensive westward services of the nearby Philadelphia airport, the volume of traffic that would be affected by the deletion, the amount of subsidy cost required to maintain the Wilmington service. This factor balancing approach is a proper method for determining what is required by the public convenience and necessity. See *Outagamie County* v. *CAB,* 355 F.2d 900, 906-08 (7th Cir. 1966). The Board's findings as to the various factors are amply supported by the record. In appraising the overall public interest, the Board emphasized that Wilmington was in a unique position, since the

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[1] 49 U.S.C. § 1371(g).

[2] 14 C.F.R. § 399.11 (1966).

relatively short driving time to the Philadelphia airport, where more frequent service is of course available, in effect gives Wilmington residents the benefit of direct service from a nearby airport.

Petitioner contends that the balancing approach, though utilized by the Board in proceedings to certify a regional airport, is contrary to the Board's established approach in decertification proceedings involving the "use it or lose it" policy. Under that established approach, petitioner says, deletion is precluded if the minimum use of five enplanements per day is met. But the Board's policy statement regulation expressly advises that the 5 per day factor was a necessary but not sufficient condition of continuation of service.[3] However useful as a guideline, it was not made a decisive criterion against decertification. When not controlled by a regulation even an established approach or precedent may be modified or overruled. An administrative agency concerned with furtherance of the public interest is not bound to rigid adherence to precedent.[4] It may switch rather than fight the lessons of

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[3] The regulation, 14 C.F.R. § 399.11(b) (1966), states: Under this "use it or lose it" policy, the Board will require each city to originate an average of five or more passengers per day during the 12-month period following the initial 6 months of operations . . . . A city generating the bare traffic minimum during this trial period cannot safely assume that continued service is assured; the Board expects most cities to exceed the minimum requirements.

[4] Pinellas Broadcasting Co. v. FCC, 97 U.S.App.D.C. 236, 238, 230 F.2d 204, 206, *cert. denied*, 350 U.S. 1007 (1956); Philadelphia Television Broadcasting Co. v. FCC, —— U.S.App.D.C. ——, 359 F.2d 282 (1966). As Judge Prettyman aptly noted (230 F.2d at 206): "The Commission's view of what is best in the public interest may change from time to time. Commissions themselves change, underlying philosophies differ, and experience often dictates changes."

The same philosophy also permits modification of a policy crystallized in a regulation, provided the regulation is duly modified.

experience. An agency reversing its course should supply an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the need for adherence to standards.[5] But petitioner does not show that the case at bar involes any such reversal. It adduces no precedent wherein the Beard held that the 5 per day standard precluded decertification notwithstanding factors substantially similar to this case in terms of alternative convenience, high subsidy cost and low volume. The Board acted properly in emphasizing the key factors that loomed large in this proceeding.

Petitioner does not advance its position by arguing that it had no advance notice that a novel approach would be used. There was novelty in the facts—at least in the context of a "use it or lose it" decertification proceeding.[6] Moreover, reference to a balancing approach as novel is a strange argument. Without minimizing the need or importance of articulation of subsidiary decisional criteria and working rules, a "balancing" approach would seem to be inherently available to an agency engaged in the task of charting the public interest in the varying situations

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[5] Compare City of Lawrence v. CAB, 343 F.2d 583 (1st Cir. 1965. The court had under consideration the Board's order in the New England Regional Airport Investigation. It affirmed the order permitting Northeast Airlines to delete service to Lawrence Massachusetts, in view of the key fact of "the proximity of Lawrence to Boston and the ready accessibility of Lawrence to Boston." However it reversed, and remanded, the order for deletion of service at New Haven and consolidation with service at Bridgeport. The court noted the Board's departure without explanation from the reasoning of earlier cases, and also referred to "internal inconsistencies" with other aspects of the same proceeding. *Id.* at 588; see West Ohio Gas Co. v. Public Util. Comm. of Ohio, 294 U.S. 63, 71 (1935).

[6] Similar factual situations led to deletion of service in other types of proceedings. See, *e.g.*, City of Lawrence v. CAB, *supra*, note 5, as to deletion of service at Lawrence.

presented for determination. It may be assumed, at least for sake of discussion, that there may be reversible error where a prior agency approach has misled a party to fail to offer proof on a point the agency has now treated as crucial. Here, however, petitioner offered evidence on the key factors considered in the Board's opinion, convenience vel non of the Philadelphia airport, anticipated volume of traffic, and subsidy costs; and petitioner makes no claim that there is material evidence that it did not submit but would have submitted if it had known that a balancing approach would be used.

Petitioner has a valid point in its contention that the Board's ultimate finding was that the public convenience and necessity did not require continuance of the service, whereas the statutory test is satisfied only if the Board finds that the public convenience and necessity affirmatively requires deletion. We are not prepared to treat the difference as inconsequential, as the Government urges. But this claim was not made before the Board. In view of the complete factual record and the clear statement in the Board's opinion setting forth the reasons for deletion if found persuasive, we do not think the interest of justice would be served by remand for further proceedings.

Affirmed.

Filed Nov. 17, 1966

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1966

No. 19,693

NEW CASTLE COUNTY AIRPORT COMMISSION, *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent,*

ALLEGHENY AIRLINES, INC., *Intervenor.*

On Petition for Review of Orders of the Civil Aeronautics Board.

Before: Bazelon, Chief Judge, Wilbur K. Miller, Senior Circuit Judge, and Leventhal, Circuit Judge.

Judgment

This case came on to be heard on the record from the Civil Aeronautics Board, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the orders of the Civil Aeronautics Board on review in this case are hereby affirmed.

Per Circuit Judge LEVENTHAL

Dated: Nov. 17, 1966

Filed Jan. 9, 1967

Order

On consideration of petitioner's petition for rehearing *en banc,* it is

ORDERED by the court *en banc* that petitioner's aforesaid petition is denied.

Per Curiam

APPENDIX B

1. United States Constitution

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Relevant provisions of the Federal Aviation Act, 72 Stat. 731, 49 U.S.C. 1301 *et seq.*:

TITLE I—GENERAL PROVISIONS

* * * * *

Declaration of Policy: The Board

Sec. 102. [72 Stat. 740, 49 U.S.C. 1302] In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound

economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

3. Sec. 401. [72 Stat. 754, as amended by 76 Stat. 143, 49 U.S.C. 1371]

Issuance of Certificate

(d)(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

Authority to Modify, Suspend, or Revoke

4. 401(g) The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or

in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided,* That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate.

5. Federal Aviation Act of 1958, as amended, 49 U.S.C. 1376(a) and (b):

Sec. 406(a) The Board is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other means than aircraft whenever such transportation is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same.

Sec. 406(b) In fixing and determining fair and reasonable rates of compensation under this section, the Board

considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the Board shall take into consideration, among other factors, (1) the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; (2) such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and (3) the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

6. Federal Aviation Act of 1958, as amended, 49 U.S.C. 1485(f):

Sec. 1005(f) Every order of the . . . Board shall set forth the findings of fact upon which it is based. . .

7. Relevant provisions of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001 et *seq.*:

* * * * *

Public Information

Sec. 3. [60 Stat. 238, 5 U.S.C. 1002] Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) *Rules.*—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of

its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

* * * * *

Adjudication

8. Sec. 5. [60 Stat. 239; 5 U.S.C. 1004] In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

(a) *Notice.*—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the pro-

ceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) *Procedure.*—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controvery by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

9. Sec. 7 [60 Stat. 241; 5 U.S.C. 1006] In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) *Presiding Officers.*—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) *Hearing Powers.*—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon

offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) *Evidence.*—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) *Record.*—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

Decisions

10. Sec. 8. [60 Stat. 242; 5 U.S.C. 1007] In cases in which a hearing is required to be conducted in conformity with section 7—

(a) *Action by Subordinates.*—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

(b) *Submittals and Decisions.*—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions

of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Judicial Review

11. Sec. 10. [60 Stat. 243; 5 U.S.C. 1009] Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) *Right of Review.*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) *Form and Venue of Action.*—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) *Reviewable Acts.*—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the

final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) *Interim Relief.*—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) *Scope of Review.*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and satutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of section 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that

the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

12. 14 C.F.R. 399.11

(d) *Continued use of local carrier services.* In evaluating the continuing need for air service at any point or on any route segment served by a local service carrier, the Board will use the minimum traffic standard of five passengers as a guide line, regardless of the type or duration of an authorization. The Board will require the local service carriers to make appropriate periodic reports of traffic results. Air carrier management is expected to suggest route or authorization modifications as soon as deficiencies in service become apparent. When a city or route segment fails to make continued use of subsidized services, the carrier is free, and is encouraged, to apply for a suspension of service in advance of a Board proceeding to terminate the certification. The failure of a local service carrier to exercise vigilance in this regard may, in fact, reflect upon the economy and efficiency of management in proceedings to determine subsidy needs under section 406 of the Act.

13. The Board's "Notation" Procedure:

CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

[SEAL]

In Reply Refer to: B-11

June 3, 1966

Received June 6, 1966 R. M. B.

Mr. Robert M. Beckman
Haffer & Beckman
703 Ring Building
Washington, D. C. 20036

Re: *New Castle County Airport Commission* v. *Civil Aeronautics Board*, C.A.D.C. No. 19,693

Dear Mr. Beckman:

In accordance with your request, I am attaching certified excerpts from the official C.A.B. Minutes relating to the Board's notation procedure.

The Board will bill you for its services, the fees and charges as set forth in Part 389 of its Organization Regulations.

Very truly yours,

/s/ HAROLD R. SANDERSON
Harold R. Sanderson
Secretary

Attachment

ATTACHMENT A

EXCERPT FROM MINUTES OF A MEETING OF THE CIVIL AERONAUTICS BOARD HELD AT ITS OFFICE IN WASHINGTON, D. C. APRIL 23, 1957

PRESENT: Mr. Durfee, Chairman, Mr. Gurney, Vice Chairman, Mr. Denny, Mr. Hector—Members of the Board

The Board convened at 10:05 a.m.

* * * * *

2. *Ratification of actions taken by Notation on April 12, 15, 16, 17, 18, 19 and 22, 1957.* The Board ratified the following actions taken by Notation on the dates shown:

* * * * *

(10) Approval of a statement of "Procedure for Handling Notation Items" (exhibit 511) and of "Tally Sheet" (exhibit 511a) for recording of Members' votes in connection with the Notation process. (April 17, 1957)

* * * * *

/s/ M. C. MULLIGAN
M. C. Mulligan
Secretary

EXHIBIT 511

Procedure for Handling Notation Items

Matters for consideration and action by the Board which, in the opinion of the originating office, will not require discussion by the Members may be circulated for approval as follows:

(1) *Dating and Numbering.* Upon receipt of the document, the Minutes Section will stamp the date it is received in the Minutes Section and assign a Notation Number for identification and control purposes.

(2) *Signature Cases.*

a. Where signatures of Members are required, the Minutes Section will forward study copies to each Member simultaneously and information copies to the Staff members concerned. Normally a signature copy will be circulated first to the Vice Chairman, if present and concurring, then to the other Members, and lastly to the Chairman.

b. When a Member is unable to take action within a reasonable time (normally within three working days), he will forward the signature copy to the Member next in order of routing and advise the Minutes Section accordingly.

c. The Minutes Section will recirculate signature copies for information and/or approval of all language changes. However, technical changes correcting citations, references, grammer, minor stylistic flaws, etc., will not be considered language changes unless so indicated by the person making the correction.

d. Members desiring to make a substantial change in language, express a comment, or ascertain the views of other Members, will request that the item be calendared.

(3) *Tally-Sheet Cases.*

a. When initials, rather than signatures, are sufficient, the Minutes Section will attach a pink tally sheet (CAB Form 124, copy attached) to study copies and forward such copies to all Members simultaneously. Information copies will also be sent to all staff members concerned.

b. The Minutes Section will indicate in the upper right-hand corner of each tally sheet a time limit which allows three working days for taking action, and in the event of an emergency, a closer time limit will be shown. In such cases an explanation of the special circumstances involved will appear on the first page of the Notation document.

c. The Member will indicate his position on the recommended action by (1) checking the appropriate box on the Tally Sheet (and, where he disapproves, indicating whether or not he wishes his dissent to be shown on the outgoing document, if any); (2) initialing in the space provided; and (3) returning the Tally Sheet to the Minutes Section.

d. When a Member wishes to postpone voting beyond the time limit, he will indicate under "Comments" his reasons for postponing his vote. Upon advice that the Member is prepared to vote, the Minutes Section will furnish another Tally Sheet.

e. When a Member approves or disapproves a recommendation, but adds comments, the Minutes Section will bring such comments to the attention of the other Members and, where necessary or desirable, to the attention of the Office(s) or Bureau(s) concerned.

(4) *Delivery of Notation Documents.* To assure prompt action on Notation items (whether signature or tally sheet cases), all documents should be hand carried among the Members' Offices and the Minutes Section. Special Messengers are available for this purpose.

(5) *Report on Status of Notation Items.* The Minutes Section will prepare and distribute to the Members twice weekly a report on the status of pending Notation items. When an item has been held beyond the designated time limit, the report will show the office holding such item and the reason therefor, if known. Items will be considered as completed only after the Minutes Section has received positive indication of the position of each Member.

ATTACHMENT B

EXCERPT FROM MINUTES OF A MEETING OF THE CIVIL AERONAUTICS BOARD HELD AT ITS OFFICE IN WASHINGTON, D. C., JANUARY 7, 1958

PRESENT: Mr. Durfee, Chairman, Mr. Gurney, Vice Chairman, Mr. Denny, Mr. Minetti, Mr. Hector—Members of the Board

The Board convened at 10:20 a.m.

• • • • •

3. *Suggestions for Revised Board Procedures.* (Calendar Items 1, 2, and 3.) The Board considered various suggestions aimed at expediting the transaction of its day-to-day business. After full discussion the following was unanimously agreed to:

(a) *Submission of matters to the Board for action*

• • • • •

Any item presented for action by notation will be calendared at the request of a Member of the Board who

feels that its nature warrants Board discussion. But when in the first instance a Member merely has a question or questions regarding the notation item he will endeavor, through his Assistant, to resolve the question or questions by discussion with the originating Office or Bureau. To facilitate this, all notation memoranda will indicate the name and telephone extension of the person or persons most familiar with the subject matter, and this requirement will also apply to memoranda dealing with items to be calendared for Board discussion.

Except when impossible due to circumstances beyond control, memoranda presenting matters for Board action will be submitted to the Members at least 24 hours prior to the date the matter is to be taken up for calendar discussion, or to a deadline for action by notation, in order to permit adequate study by the Members. The staff concerned will be expected to give clear and positive reasons in justification of any deadline requiring departure from the foregoing rule.

* * * * *

/s/ M. C. MULLIGAN
M. C. Mulligan
Secretary

[SEAL]

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1249

BOARD OF TRANSPORTATION OF NEW CASTLE COUNTY, DELAWARE, PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–5a) is reported at 371 F. 2d 733. The orders of the Civil Aeronautics Board (R. 542, 572, 588, 593, 609) are not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 6a) was entered on November 17, 1966, and its order denying rehearing *en banc* (Pet. App. 6a) was entered on January 9, 1967. The petition for a writ of certiorari was filed on April 10, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Civil Aeronautics Board properly applied its "use it or lose it" standard when it eliminated Wilmington, Delaware, from one of the routes served by Allegheny Airlines.

2. Whether, assuming an arguable defect in the form of the Board's ultimate finding of public convenience and necessity, the court of appeals erred in not remanding the case to the Board, when the alleged defect was not called to the Board's attention and was not found by the court to be prejudicial.

3. Whether the Administrative Procedure Act required the court of appeals to discuss every legal contention raised by the petitioner.

STATUTES AND REGULATIONS INVOLVED

Some of the pertinent provisions of the Federal Aviation Act of 1958, 72 Stat. 731, as amended, 49 U.S.C. 1301 *et seq.*; the Administrative Procedure Act, 60 Stat. 237, as amended, 5 U.S.C. 1001 *et seq.* (prior to recodification by P. L. 89–554, 80 Stat. 378, 5 U.S.C. 551–559, 701–706); and the regulations and policy statements of the Civil Aeronautics Board, 14 C.F.R. Part 399 are set forth in Appendix B to the petition for certiorari. Other pertinent provisions of the foregoing are set forth in Appendix A to this brief (*infra*, pp. 15–19).

STATEMENT

Following a full evidentiary hearing in which petitioner [1] participated, the Civil Aeronautics Board by

[1] References in this brief to "petitioner", and to "Wilmington" as a party litigant, refer to the present petitioner's predecessor

order amended the certificate of public convenience and necessity held by Allegheny Airlines, Inc., a federally subsidized local-service air carrier, so as to delete Wilmington, Delaware, as an intermediate point on segment 3 of Allegheny's route, running from New York to Pittsburgh via Philadelphia, Wilmington and central Pennsylvania points. The effect of this action was to terminate Allegheny's authority to resume its direct service between Wilmington and segment 3 points west of Wilmington, principally Pittsburgh—service which Allegheny discontinued in 1963 after many years of substandard traffic response, and whose resumption petitioner was demanding. The Board's action did not affect Wilmington's service on Allegheny's segment 8 (Boston-Washington via numerous intermediates) or its service on Eastern Air Lines' routes 5 and 6 (Boston-Washington-points west and south).[2]

Section 401(g) of the Federal Aviation Act, 49 U.S.C. 1371(g) (*infra*, p. 16), authorizes the Board, after notice and hearing, to amend the certificate of any air carrier if the public convenience and necessity so require. The Board has adopted a "use it or lose it" policy, 14 C.F.R. 399.11 (*infra*, pp. 17–19), whereby cities which do not make sufficient use of subsidized air service to justify its cost to the carrier and the government are subject to decertification proceedings

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in interest, the New Castle County Airport Commission, which represented the interests of the Wilmington community before the Board and in the court of appeals.

[2] Allegheny also retains authority to render either connecting or single-plane service between Wilmington and Pittsburgh via either Philadelphia or Washington.

under Section 401(g). The standard of use set by the Board is the origination of an average of 5 passengers per day at the city in question over a representative 12-month period on each route segment on which it is certificated; however, the Board's policy statement warns that this is a minimum standard and that a city generating a scant 5 passengers a day "cannot safely assume that continued service is assured" (14 C.F.R. 399.11(b)). In prior "use it or lose it" investigations, the Board has terminated subsidized service to some 67 communities pursuant to this policy.

Finding that at Wilmington in 1962 an average of only 3.1 passengers a day had enplaned on Allegheny's segment 3, the Board initiated an investigation under the "use it or lose it" policy to determine whether the public convenience and necessity required termination of Wilmington's certification on this segment (R. 13–17). Shortly thereafter, Allegheny discontinued its direct Wilmington-Pittsburgh flights and rendered thenceforth only connecting service via Philadelphia or Washington.[3]

At the hearing, the evidence showed that in the last full year of direct Wilmington-Pittsburgh service, only 1.4 passengers a day were enplaning at Wilmington for Pittsburgh and points beyond, and only 0.35 for other segment 3 points not also served on other Alle-

[3] In a separate proceeding the Board held that this form of service was permissible under Allegheny's certificate, but that the public need for resumption of direct service would be one of the matters considered in the "use it or lose it" case (Order E–20483, Feb. 14, 1964). Petitioner did not appeal this order.

gheny route segments (R. 506, 508).* It also showed that the Philadelphia International Airport is only 21 miles and 50–60 minutes driving time from downtown Wilmington; that frequent and inexpensive limousine service is available (R. 504–505); that the air service to Pittsburgh and points west available at Philadelphia is faster, cheaper, and far more frequent than that available at Wilmington's own airport; and that in consequence the bulk of Wilmington-Pittsburgh air travelers have habitually used the Philadelphia airport (R. 544–545).

The Board's hearing examiner found, however, that Wilmington's segment 3 traffic could be increased to the 5-a-day level if Allegheny would double its former Wilmington-Pittsburgh flights and reduce the number of stops made (R. 509–510). He estimated that Allegheny would lose money on these flights and would therefore require increased subsidy (R. 515), but nevertheless recommended against Wilmington's deletion from segment 3 (R. 516).

The Board disagreed with the examiner's application of the "use it or lose it" policy to the circumstances shown of record (R. 542–553). It pointed out that 5 passengers a day is simply a *prima facie* minimum standard of service use under the policy, and that the public convenience and necessity are to be determined by weighing and balancing all relevant factors. Traffic response (historic and potential) is only one such factor. Others relevant here were the ready accessibility of the Philadelphia airport and the su-

*Petitioner disclaimed interest in resumed service to any segment 3 point other than Pittsburgh.

perior services to Pittsburgh available there; the fact that only slight added convenience and minor savings of time and distance to the Wilmington-Pittsburgh traveler resulted from use of Wilmington's own airport; and the disproportionate cost of the direct service to the carrier and to the government in subsidy, which cost the Board found had been seriously underestimated by the examiner. The Board found that an increase in the former number of Wilmington-Pittsburgh flights would increase total patronage, but not as much as the examiner thought, nor enough to justify the greatly increased costs to be incurred.

In a supplemental opinion and order containing further findings on subsidy cost and discussing its past precedents [5] (R. 572–587), the Board denied Wilmington's petition for reconsideration of its decision.[6]

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[5] The statement that "the Board conceded numerous errors" (Pet. 5) is entirely untrue. The Board corrected a single minor misstatement in its earlier opinion concerning traffic statistics for a four-month period in 1961, but held that this correction required no change in its conclusion (R. 582–583).

[6] The facts surrounding the adoption of the June 1 order are set forth in the Board's subsequent order of July 23, 1965 (R. 591–592). Briefly, the Board completed its quasi-judicial action on the former order under its "notation" voting procedure on the morning of June 1, when the fifth and final member of the Board signed the order (three members concurred, two signed as not participating). Shortly after noon on the same day, and before the Board's staff had completed the ministerial function of serving the order on the parties, one of the concurring members left the Board for another government post.

Under the "notation" procedure, an item ready for final Board action is circulated to each member, who indicates in writing his participation and vote and whether or not he wishes the item "calendared" (discussed at a Board meeting). If no member requests calendaring, and a majority of a quorum

Subsequently, the Board in brief orders rejected three further attempts by petitioner, on various grounds, to reopen the case (R. 588, 593, 609).

The court of appeals, in an opinion by Judge Leventhal (Pet. App. 1a–5a), affirmed the Board's orders. It held that the Board had properly assessed the requirements of the public convenience and necessity by weighing and balancing the factors of passenger convenience, volume of traffic affected, and subsidy cost. It found no conflict between this decision and either the Board's prior decisions or its "use it or lose it" policy statement. The court also rejected petitioner's claim to have been surprised by the Board's use of the balancing technique, observing that the petitioner had in fact introduced extensive evidence as to each factor the Board considered. Finally, the court noted that the Board's ultimate public convenience and necessity finding was phrased negatively, rather than positively as it considered the statute to require; but since petitioner had failed to make this objection before the Board, and in view of the clarity of the Board's explanation for its action deleting Wilmington from segment 3, the court did not "think the interest of justice would be served by remand for further proceedings."

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concur, the item is deemed approved as soon as the fifth member indicates his vote, whereupon it is immediately recorded, publicly issued, and in due course served on the parties. It has also been the Board's practice routinely to ratify orders adopted by notation at the next convenient Board meeting (here, the meeting of June 8, 1965).

262-715—67——2

ARGUMENT

The decision below is correct, there is no conflict of decisions, the case is of no practical importance, since setting aside the Board's orders would not result in any change in the present pattern of air service at Wilmington, and no substantial question warranting consideration by this Court is presented. Accordingly, there is no occasion for further review.

1. The Board here observed the decisional standards announced in its "use it or lose it" policy statement (14 C.F.R. 399.11, *infra*, pp. 17–19) and in its relevant prior decisions. Petitioner misapprehends the criterion for maintaining subsidized service to a community. The *prima facie* standard for retention of subsidized service—an average of 5 passengers a day—refers to actual use of the service during the relevant test period, not possible use given a hypothetical level of service. The evidence showed that the minimum level of use had not in fact been achieved at Wilmington. The examiner's finding that use might be increased if Allegheny doubled the number of flights is, therefore, irrelevant to the Board's "use it or lose it" standard.[8a] Furthermore, the 5 passengers per day standard has never been the conclusive determinant of the public convenience and necessity for retention or

[8a] In some cases, a showing that the existing pattern of air service was wholly inadequate to meet the travel needs of the community has been a factor (along with isolation, national defense needs, etc.) in leading the Board to find "unusual or compelling circumstances" warranting refusal to apply strictly the "use it or lose it" standard. *Mohawk Intermediate Points Renewal*, 33 C.A.B. 149, 150; *West Coast Air., Intermediate Points Renewal*, 33 C.A.B. 237, 239. However, none of these factors was shown to exist here.

loss of subsidized air service. The Board's policy statement and the cases applying it make this quite clear: "A city generating the bare traffic minimum during the trial period cannot safely assume that continued service is assured; the Board expects most cities to exceed the minimum requirements" (14 C.F.R. 399.11(b)). As the court of appeals pointed out (Pet. App. 4a), petitioner has never been able to to cite any Board pronouncement to the contrary.

Petitioner concedes (Pet. 15–16), as it must in the light of the unanimous authorities,[7] the validity of the weighing-and-balancing technique of assessing the public convenience and necessity. But it contends that the Board mistakenly considered factors applicable only to the "regional airport" policy rather than those applicable to the "use it or lose it" policy. However, the relevant factors do not differ between these two policies. Passenger convenience, volume of traffic affected, and subsidy costs are always considered in "use it or lose it" cases as well as in "regional airport" cases.[8] Petitioner was fully aware of the factors

[7] *Secretary of Agriculture* v. *Central Roig Rfg. Co.*, 338 U.S. 604, 612–614; *City of Pontiac* v. *Civil Aeronautics Board*, 361 F. 2d 810, 814 (C.A. 6); *Outagamie County* v. *Civil Aeronautics Board*, 355 F. 2d 900, 906–907 (C.A. 7); *Airport Commission of Forsyth County* v. *Civil Aeronautics Board*, 300 F. 2d 185, 187 (C.A. 4). *City of Lawrence* v. *Civil Aeronautics Board*, 343 F. 2d 583 (C.A. 1) is not to the contrary, for the court there affirmed the Board's deletion of service at Lawrence, Mass. (in circumstances closely paralleling those of the present case), based on the balancing technique.

[8] Compare *Airport Commission of Forsyth County* v. *Civil Aeronautics Board*, 300 F. 2d 185 (C.A. 4) ("regional airport"), with *City of Pontiac* v. *Civil Aeronautics Board*, 361 F. 2d 810 (C.A. 6) ("use it or lose it").

the Board would consider since, as the court below pointed out (Pet. App. 5a), it introduced extensive testimony and exhibits as to each of the factors which the Board weighed.

2. Petitioner urges this Court to review the form of the Board's ultimate finding of public convenience and necessity in its first order herein (R. 542, 550–551). It argues that the order was phrased negatively ("the public convenience and necessity do not require continuation of Allegheny's authority"); whereas Section 401(g) of the Act (*infra*, p. 16), under which the Board was acting, is phrased positively ("the Board * * * may * * * amend * * * any such certificate * * * if the public convenience and necessity so require"). This contention was never raised before the Board in any of the petitioner's numerous requests for reconsideration and rehearing and is therefore barred by Section 1006(e) of the Federal Aviation Act.[9] See, also, *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37; *Gearhart & Otis, Inc.* v. *Securities and Exchange Commission*, 348 F. 2d 798, 801 (C.A.D.C.). Petitioner's objection, which raises only a matter of form, could readily have been obviated if petitioner had seasonably raised it before the Board.

In any event, the negative form of the ultimate conclusion did not go to the substance of the case or prejudice petitioner. As the court below found (Pet. App. 5a), the Board made all the fact findings

[9] "No objection to an order of the Board * * * shall be considered by the court unless such objection shall have been urged before the Board * * * or, if it was not so urged, unless there were reasonable grounds for failure to do so."

required by the statute and fully explained its reasons. Moreover, the Board had already held in a separate proceeding that direct Wilmington-Pittsburgh flights were not required by Allegheny's then existing certificate, and that the connecting service Allegheny continued to provide satisfied its certificate obligations.[10] That decision was not appealed. Thus, in the instant case, the issue was not whether Allegheny was authorized to discontinue direct flights, but whether the public convenience and necessity required that it should be directed to resume such flights. After weighing all the relevant factors, the Board found that such resumption was not required. Having found no public need for such resumption, the Board eliminated Allegheny's authority for this service from its certificate, thus conforming the certificate to Allegheny's actual post-1963 flight pattern. Even if a further affirmative finding should have been made in the language of Section 401(g), failure to make it here was not prejudicial error within the meaning of the Administrative Procedure Act (5 U.S.C. 1009(e)). Cf. *Rochester Tel. Corp.* v. *United States,* 307 U.S. 125, 141–142.

Moreover, setting aside the Board's order on this ground would have no practical result. Allegheny's obligation to serve Wilmington would simply revert to what it had been immediately prior to the Board's order. Allegheny would thus hold authority for direct flights from Wilmington but would only be required to provide connecting service.

3. Petitioner also urges that the court below erred in failing to rule expressly on every issue raised by it.

[10] See n. 3, *supra*, p. 4.

There is no merit whatever in this contention. The court of appeals carefully considered all of the issues raised by appellant and expressly discussed those which it deemed to require discussion.[11]

(a) Petitioner complains that the court of appeals did not pass upon the validity of the Board's "notation" voting procedure, by which the Board's supplemental opinion and order (R. 572–587) was adopted.[12] Petitioner, however, failed timely to raise any issue concerning this procedure before the Board and therefore, under Section 1006(e) of the Act (n. 9, *supra*, p. 10), could not properly do so before the court below. In *Braniff Airways, Inc.* v. *Civil Aeronautics Board* (C.A.D.C., No. 20,160, decided April 12, 1967), a case concerning an order adopted simultaneously with the order here under attack, the same court

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[11] On April 25, 1967, the court of appeals amended Rule 24 of its General Rules as follows:

"(c) *Order Form of Decision.* In accordance with recommendations for improvement of judicial administration, this court may, while according full consideration of the issues, dispense with opinions where the issues occasion no need therefor, and confine its action to such abbreviated disposition as it may deem appropriate, *e.g.*, affirmance by order of a decision or judgment of a court or administrative agency; a judgment, of affirmance or reversal, containing a notation of precedents, or accompanied by a brief memorandum."

See, Report of the President's Commission on Crime in the District of Columbia (1966) p. 308; and see Canon 19, American Bar Association Canons of Judicial Ethics.

[12] Petitioner's description of this procedure (Pet. 5, 17) is entirely inaccurate; see n. 6, *supra*, pp. 6–7. In particular, notation voting is final, not preliminary; while ratification has been customary, under neither the Board's rules nor the relevant statutes is it essential to the validity of an order adopted by notation; and in any case ratification was accomplished here in strict accordance with the Board's customary procedure.

(again per Judge Leventhal), in upholding the notation procedure, explained that it had not passed on the issue in the present case because "it was not properly before us."[13]

(b) Next, petitioner says the court should have held that the Board acted arbitrarily, following its denial of the first petition for reconsideration, in denying rehearing on grounds of changed Board membership. However, the grant of rehearing is strictly discretionary with the agency, *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 535, and the validity of the Board's policy of not granting rehearing of finally decided cases whenever its membership changes is obvious.[14]

(c) Finally, petitioner argues that the Board's findings were insufficient because the Board in its opinion failed to recite certain language of Section 102 of the Act (49 U.S.C. 1302), which sets broad standards for the guidance of the Board's action under the overall standard of public convenience and necessity. Nothing in the Act or in prior decisions requires the Board to recite the provisions of Section 102 in every opinion it writes; petitioner's objection is answered in substance by the court's holding that the Board

[13] For the court's convenience, the material portions of the *Braniff* decision, which is not yet reported, are reprinted as Appendix B hereto (*infra*, pp. 20–27). The language quoted in the text is from footnote 2 to that decision (*infra*, p. 22).

[14] The two contemporaneous cases petitioner cites (Pet. 18) are not in point, for in both instances the Board had not yet completed its decisional process when the departure of one member created an impasse, whereas here that process was complete with the adoption of the Board's June 1, 1965 order.

fully explained its action and applied the proper decisional standards.

CONCLUSION

For these reasons, the petition for certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
DONALD F. TURNER,
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JOSEPH B. GOLDMAN,
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FREDERIC D. HOUGHTELING,
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Civil Aeronautics Board.

MAY 1967.

APPENDIX A

The relevant provisions of the Federal Aviation Act of 1958, 72 Stat. 731, as amended, 49 U.S.C. 1301 *et seq.*, are:

TITLE IV—AIR CARRIER ECONOMIC REGULATION

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

CERTIFICATE REQUIRED

SEC. 401 [72 Stat. 754, as amended, 49 U.S.C. 1371] (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

* * * * * *

TERMS AND CONDITIONS OF CERTIFICATE

(e)(1) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require.

* * * * * *

AUTHORITY TO MODIFY, SUSPEND, OR REVOKE

(g) The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided,* That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate.

* * * * *

TITLE X—PROCEDURE

* * * * *

JUDICIAL REVIEW OF ORDERS

ORDERS OF BOARD AND ADMINISTRATOR SUBJECT TO REVIEW

SEC. 1006. [72 Stat. 795, as amended, 49 U.S.C. 1486] (a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days

after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

* * * * *

FINDINGS OF FACT CONCLUSIVE

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

* * * * *

The relevant provisions of the regulations of the Civil Aeronautics Board, "Statements of General Policy," 14 C.F.R. Part 399, are:

399.11 *"Use it or lose it" policy for subsidized local service carriers.*

(a) *Expansion of local carrier services.* Consistent with the Board's basic policy of affording the advantages of air transportation to as many persons as practicable, the Board has substantially expanded the services of subsidized local carriers and has given many small cities, with marginal or unknown traffic potentialities, a chance to demonstrate that they will use and can support new or improved air services adapted to their specific needs. The Board expects the cities awarded local air service to make a determined effort to generate the traffic forecast in the certification proceedings. Unless adequate use is made of subsidized air services, the cost to the Government is not justified and the Board should terminate the authorization.

(b) *Minimum traffic standard for newly certificated cities.* It is the policy of the Board to make an early and critical evaluation of the traffic results of new authorizations to determine whether newly certificated cities are making sufficient use of authorized services or should lose such services for lack of use. Under this "use it or lose it" policy, the Board will require each city to originate an average of five or more passengers per day during the 12-month period following the initial 6 months of operations. If a city is certificated on more than one segment, the five-passenger standard will be applied to each segment. If a city fails to meet this minimum traffic standard, the Board will, in the absence of unusual or compelling circumstances, institute a formal investigation to determine whether service should be suspended or terminated. A city generating the bare traffic minimum during this trial period cannot safely assume that continued service is assured; the Board expects most cities to exceed the minimum requirements.

* * * * *

(d) *Continued use of local carrier services.* In evaluating the continuing need for air service at any point or on any route segment served by a local service carrier, the Board will use the minimum traffic standard of five passengers as a guide line, regardless of the type or duration of an authorization. The Board will require the local service carriers to make appropriate periodic reports of traffic results. Air carrier management is expected to suggest route or authorization modifications as soon as deficiencies in service become apparent. When a city or route segment fails to make continued use of subsidized services, the carrier is free, and is encouraged, to apply for suspension of service in advance of a Board proceeding to terminate the certification. The failure of a local service carrier to exercise vigilance in

this regard may, in fact, reflect upon the economy and efficiency of management in proceedings to determine subsidy needs under section 406 of the Act.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,160

BRANIFF AIRWAYS, INCORPORATED, PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

EASTERN AIR LINES, INC., INTERVENOR

ON PETITION FOR REVIEW OF ORDERS OF THE CIVIL AERONAUTICS BOARD

Decided April 12, 1967

* * * * *

Before Danaher, McGowan and Leventhal, Circuit Judges.

Leventhal, Circuit Judge:

* * * * *

B. The Procedural Objections to the Board's June 1, 1965, Order Certifying Eastern.

1. Braniff argues that the June 1, 1965, order is invalid because no quorum of the Board was available on critical dates.

The award on its face indicated that it was concurred in and signed on June 1, 1965, by Chairman Boyd (as well as Members Minetti and Gillilland). Braniff argues that by June 1, 1965, Mr. Boyd was

no longer a member of the Civil Aeronautics Board since on that day he was sworn in as Under Secretary of Commerce.

The payroll records of the agencies show that Mr. Boyd was carried on the payroll of the Board only through May 31, 1965, and on the payroll of the Department of Commerce as of June 1, 1965. But these records explicitly declare that they are to be used for payroll purposes only. These bookkeeping computations do not control substantive questions of official authority.

Mr. Boyd did not formally resign. After presiding over the Board's conference on the morning of June 1, he made the short journey to the White House to be sworn in to his new office. We are convinced that he was still a qualified member of the Board when its deliberative process was completed on this case.

2. Braniff then says that although the award was dated and entered on June 1, it was not served until June 2, and that under the Board's own decisions, *e.g., New York-Florida Case,* 24 C.A.B. 94, 229 (1956), a "proposed decision of the Board does not become effective until an opinion and order containing detailed findings of fact and conclusions of law has been approved, issued, *and served* * * *. Until such time, each Member has retained full power to revise or reverse his vote and his findings on any of the matters under consideration." (Emphasis added.) We must read that passage in context. It was an attempt by the Board to justify its practice of issuing press releases announcing a result tentatively arrived at long in advance of the issuance of an opinion and order. In our view it is plain that once all members have voted for an award and caused it to be issued the order is not nullified because of incapacity, intervening before the

ministerial act of service, of a member needed for a quorum. The Board's rulings on the other orders entered June 1 and served at a later date indicate that the Board considers the crucial time for testing the validity of an order to be the time when it is adopted and entered, and not when it comes into the hands of the parties.[2] This approach seems entirely reasonable.

3. Next, Braniff challenges the Board's use of its "notation" procedure. Under the notation practice the views and votes of the members of a regulatory agency may be recorded separately rather than in joint session, and circulated to the remaining members for their attention.

Under Section 201(c) of the Federal Aviation Act of 1958, 49 U.S.C. § 1321(c) (1964), "three of the members shall constitute a quorum of the Board." Valid agency action depends on the effective concurrence of a majority of the designated quorum, *WIBC, Inc.* v. *FCC,* 104 U.S. App. D.C. 126, 128, 259 F. 2d 941, 943, *cert. denied,* 358 U.S. 920 (1958). But the quorum acting on a matter need not be physically present together at any particular time to ponder the evidence, *Sisto* v. *CAB,* 86 U.S. App. D.C. 31, 38, 179 F. 2d 47,

[2] Even those members who thought reconsideration should have been granted, and the route assigned to Braniff, did not do so on this ground. In considering the *Salisbury-Wilmington "Use It or Lose It" Case,* Order E–22253, June 1, 1965, 2 CCH Av. L. Rep. Par. 21562 (1965), the Board rejected the argument that Chairman Boyd was not a member on June 1, held that he continued in office until he took his new oath that afternoon, and dismissed the petition for reconsideration. (Order E–22472, July 23, 1965). That order was affirmed by this court: *New Castle County Airport Comm'n* v. *CAB,* — U.S. App. D.C. —, 371 F. 2d 733 (1966). We avoided passing on this issue, on the basis of representations it was not properly before us but would be ripe for our attention in the instant case.

54 (1949). Section 1001 of the Act authorizes the Board to "conduct [its] proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice." 49 U.S.C. § 1481 (1964). This permits the Board to proceed with its members acting separately, in their various offices, rather than jointly in conference. This is a reasonable way for the Board to proceed in dealing with its not inconsiderable work load. A similar system is in use on this court for processing motions and the deluge of petitions for rehearing *en banc*.

The Interstate Commerce Commission's use of notation voting procedure has been held valid under an identical statutory provision, Section 17(3) of the Interstate Commerce Act, 49 U.S.C. § 17(3) (1964). See *T.S.C. Motor Freight Lines, Inc.* v. *United States*, 186 F. Supp. 777, 784–86 (S.D. Texas, 1960), *aff'd per curiam sub nom. Herrin Transp. Co.* v. *United States*, 366 U.S. 419 (1961). See also *Eastland Co.* v. *FCC*, 67 App. D.C. 316, 319, 92 F. 2d 467, 470, *cert. denied*, 302 U.S. 735 (1937), construing the equivalent section of the Communications Act, Section 4(j), 47 U.S.C. § 154(j) (1964).

Braniff argues that the notation procedure, while not invalid per se, was improper here because our previous remand to make adequate findings made this case "peculiarly appropriate for discussion among Board members" and "there was evidently no meeting to discuss the findings." (Brief for Petitioner at 26). It is "not the function of the court to probe the mental processes" of administrative officers, *Morgan* v. *United States*, 304 U.S. 1, 18 (1938). A strong presumption of regularity supports the inference that when administrative officials purport to decide weighty issues within their domain they have conscientiously considered the issues and adverted to the

views of their colleagues. See generally *Willapoint Oysters, Inc.* v. *Ewing,* 174 F. 2d 676, 696 (9th Cir.), *cert. denied,* 338 U.S. 860 (1949); *T.S.C. Motor Freight Lines, Inc.* v. *United States, supra,* 186 F. Supp. at 790. Agencies are no more bound to enter for the record the time, place, and content of their deliberations than are courts.

4. It appears that Chairman Boyd actually signed the award on May 28, 1965, not June 1. So stated Members Minetti and Gillilland on denial of reconsideration. After the petition for review was filed, Braniff learned that Chairman Boyd had not been in Washington on May 28. Braniff sought clarification and the Board filed in this court an affidavit of its Associate General Counsel that stated in pertinent part:

> I looked into the questions that were raised by the [Braniff] letter. I learned that Chairman Boyd was in Florida on May 28, attending a testimonial dinner, that a copy of the final draft of the Board's opinion and order which became Order No. E–22252 was taken to him, that Chairman Boyd subsequently directed his Assistant to affix Chairman Boyd's signature to the signature copy of Order No. E–22252 in accordance with normal practice, and that Chairman Boyd's Assistant carried out that instruction. Finally, I was told that if the circumstances required it, Mr. Boyd and his Assistant would supply affidavits covering these circumstances.

There were reasonable circumstances justifying presentation of this issue to the court, although it had not been urged before the Board,[3] but we find no prejudicial error requiring reversal on this ground.

[3] See Section 1006(e) of the Federal Aviation Act of 1958, 49 U.S.C. § 1486(e) (1964). The Administrative Procedure Act provides that in reviewing agency action "due account shall be

We agree with Professor Davis, 2 ADMINISTRATIVE LAW § 11.07 at 66 (1958), that "despite its immediately appealing quality, the broad ideal that agency heads should do personally what they purport to do is for many functions impractical and unworkable * * *." The use of assistants in the administrative process is indispensable to the orderly and efficient expedition of great volumes of work and the reconciliation of divergent responsibilities. The courts have consistently approved an administrator's utilization of a staff member he deemed qualified in the performance of his official functions. It is well settled that even in the adjudicatory process, an administrative officer may rely on subordinates to sift and analyze the record and prepare summaries and confidential recommendations, and the officer may base his decision on these reports without reading the full transcript. See, *e.g., Morgan* v. *United States,* 298 U.S. 468, 481–82 (1936); *Norris & Hirshberg, Inc.* v. *SEC,* 82 U.S. App. D.C. 32, 36, 163 F. 2d 689, 693 (1947), *cert. denied,* 333 U.S. 867 (1948); *Willapoint Oysters, Inc.* v. *Ewing, supra,* 174 F. 2d at 696. The only requirement is that the decision in the ultimate must be that of the administrative officer, for he "bears full legal and personal accountability for that which bears his name or concurrence." *T.S.C. Motor Freight Lines, Inc.* v. *United States, supra,* 186 F. Supp. at 790.

While such procedure should be used sparingly, and only when prompted by some administrative necessity, we think a member of a regulatory agency who has considered the issues in a matter may direct an assist-

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taken of the rule of prejudicial error." 5 U.S.C. § 706. (This is the numbering in the recodification wrought by Pub. L. 89–554, 80 Stat. 378 (1966).)

ant to record his concurrence in a proposed disposition of them.[4]

The minutes of the June 1 meeting recite that Chairman Boyd presided.[5] Although this case was not formally raised at the meeting, we think this circumstance, coupled with the unquestioned fact that the other four members of the Board (two as not participating) on that day signed the opinion which on its face contained the concurrence of Chairman Boyd, supports the inference that the authorized signature of the Chairman was affixed to the opinion while he was still competent to vote.[6]

We do not intend that the attention we have paid to these arguments be interpreted as giving disappointed litigants a license to rummage through the internal processes of an administrative agency, searching for some irregularity, or the hint of one, on which

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[4] The Second Circuit has accepted an even greater delegation of responsibility by Board members to their subordinates. In *Eastern Air Lines, Inc.* v. *CAB*, 271 F. 2d 752, 758 (1959), *cert. denied*, 362 U.S. 970 (1960), that court found no error where the assistants to two Board members participated in meetings in place of their superiors and actually cast votes on tentative awards. The court there pointed out that the votes "cast by the assistants were cast in compliance with instructions given by their superiors."

[5] This minute implicitly affirms Chairman Boyd's belief that he was still authorized to function as a member of the Board. This court has previously relied on the minutes of Board meetings to show that a member regarded himself as "qualified and prepared to vote on the issues in the case," *Western Air Lines, Inc.* v. *CAB*, 122 U.S. App. D.C. 81, 83 n.4, 351 F. 2d 778, 780 n.4 (1965), and to demonstrate that only authorized personnel attended, *North Central Air Lines, Inc.* v. *CAB*, 108 U.S. App. D.C. 185, 190, 281 F. 2d 18, 23 (1960).

[6] We need not consider whether there would be any material difference if the direction given while Mr. Boyd was a member had been executed after he severed his connection with the Board.

to base a challenge to the validity of the decision. In a few highly unusual cases it may be appropriate to examine the procedures followed in making an institutional decision, see *Union Savings Bank* v. *Saxon,* 209 F. Supp. 319 (D.D.C. 1962). The general rule remains that a party is not entitled to probe the deliberations of administrative officials, oversee their relationships with their assistants, or screen the internal documents and communications they utilize. "Just as a judge cannot be subjected to such a scrutiny * * * so the integrity of the administrative process must be equally respected." *United States* v. *Morgan,* 313 U.S. 409, 422 (1941). We cannot allow the recital by an administrative agency that it has considered the evidence and rendered a decision according to its responsibilities to be overcome by speculative allegations. See *Willapoint Oysters, Inc.* v. *Ewing, supra,* 174 F. 2d at 696.

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